IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6374 of 1983

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ISHWARBHAI GOKULBHAI SURTI

Versus

K M BHATT

Appearance:

Mr. AI Surti for Petitioner.

MR PJ MEHTA for Respondent No. 1

NOTICE UNSERVED for Respondent No. 2

NOTICE SERVED for Respondent No. 3

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

and

MR.JUSTICE K.A.PUJ

Date of decision: 28/12/2001

CAV JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

The petitioner, in this petition under Article 226 of the Constitution of India, has challenged the constitutional validity of Section 7-A and 19A of The Employees Provident Fund and Miscellaneous Provisions Act, 1952 [hereinafter referred to as "the Act"] as offending Articles 14, 19(1)(f) and 19(1)(g) of the Constitution of India. The petitioner has further challenged the order dated 21.7.1983 passed by the Regional Provident Fund Commissioner, Gujarat State, Ahmedabad, respondent No.1 in the matter of enquiry under Section 7A of the Act confirming his earlier order dated 15.9.1982 passed under Section 7A of the Act. The petitioner has further challenged the order dated 23.9.1983 passed by the Legal Adviser, Ministry of Labour & Rehabilitation, Department of Labour, Government of India, New Delhi, respondent No.2 herein under Section 19A of the Act dismissing the revision made by the petitioner challenging the orders dated 15.9.1982 and 21.7.1983 passed by the 1st respondent.

2. Before we deal with the aforesaid challenges made by the petitioner in this petition, it is necessary to set out relevant facts leading to the controversies arose between the parties. One Mr. Ishwarlal Gokulbhai Surti, the petitioner herein has filed this petition in the capacity of Sole Proprietor of M/s. Lovely Tailors. The said concern has started its business in the year 1958 at Wada Pole Naka, Khadia, Ahmedabad. Thereafter, the said proprietory concerned was converted into a partnership firm having Shri Ishwarbhai Gokulbhai Surti and Smt. Vasantiben Ishwarbhai Surti as partners. It appears from the partnership deed dated 14.5.1975 that the said partnership firm was formed with a view to make expansion in trade in clothes and to do tailoring work, washing and sale of ready-clothes which was originally carried on by Shri Ishwarbhai Gokulbhai since long. Subsequently, with effect from 20th October 1979 Shri Ishwarbhai Gokulbhai has become the sole proprietor of the said firm.

3. During subsistence of the partnership firm of M/s. Lovely Tailors, one another firm, namely M/s. S. Lovely & Company was started in the year 1975 at the same place and same premises where M/s. Lovely Tailors was doing the business. The said M/s. S. Lovely & Company was having three partners namely, Smt. Savitaben Ishwarbhai Surti, Shri Hirabhai Ishwarbhai Surti and Smt. Vasantikaben Ishwarbhai Surti. All the three partners of this firm are related with each other. Smt. Savitaben Ishwarbhai Surti was wife of Shri Ishwarbhai Gokulbhai Surti who was initially a Proprietor and thereafter a

partner of M/s. Lovely Tailors. Hirabhai Gokulbhai Surti is brother of Ishwarbhai Gokulbhai Surti and Smt. Vasantikaben Ishwarbhai Surti is daughter of Shri Ishwarbhai Gokulbhai Surti. Smt. Vasantikaben Ishwarbhai Surti is common partner both in M/s. Lovely Tailors and M/s. S. Lovely & Company and the premises of both the firms are the same. From the partnership deed of M/s. S. Lovely & Company dated 14.5.1975, it appears that the said partnership firm has been constituted with a view to carry on the business of cloth, tailoring of cloth and washing and to sell readymade clothes. During the course of the inquiry, it was found that M/s. S. Lovely & Company has brought its capital from Lovely Tailors. It was also found from the ledger account of M/s. Lovely Tailors that M/s. S. Lovely & Company has been financed by M/s. Lovely Tailors.

4. It is further revealed that the third concern, namely, M/s. H. Lovely Stores had been started as a partnership concern with effect from 25.10.1974 at Shop No.5-A, Capital Commercial Centre, Ashram Road, Ahmedabad. The said partnership was consisting of three partners, namely Shri Hirabhai Gokulbhai Surti, Smt. Savitaben Ishwarbhai Surti and Master Anilbhai Ishwarbhai (Minor). It was found from the Deed of Partnership dated 25.10.1974 that the said partnership firm has been started for the purpose of sale of clothes and to do the work of commission agent. This trading concern was also started with the amount advanced by M/s. Lovely Tailors.

5. That in the month of December 1976, one Mr. Kuruvilla, Provident Fund Inspector inspected the premises of M/s. S. Lovely & Company and called upon the said firm to submit information regarding ownership of the shop in the prescribed form as contemplated under the Employees Provident Fund Scheme. Records of M/s. S. Lovely & Company were examined by the Inspector and detailed correspondence was exchanged between the authorities as well as the above concerns. The respondent No.1 has passed an order for inquiry under Section 7A of the Act on 8.9.1981 making M/s. H. Lovely Stores a party to the proceedings and permitting the petitioner-concern, M/s. S. Lovely & Company and M/s. H. Lovely Stores to lead evidence. The respondent No.1 had called upon all the three concerns to produce various books of accounts and other records from time to time and ultimately the respondent No.1 has passed an order on 15.9.1982 rejecting the preliminary contentions raised by all the three concerns that they were not amenable to the provisions of the Act as they were not establishments and

that they have never employed more than 19 persons at any point of time or that the combined coverage was not called for in the facts and circumstances of the case.

6. Being aggrieved by the said order dated 15.9.1982 passed by the respondent No.1, the petitioner had filed a writ petition, being Special Civil Application No. 4204 of 1982 before this Court challenging the said order, inter alia, on the ground that the Act was not applicable to the petitioner concern as the petitioner was not an establishment, and that the petitioner had not employed more than 19 persons at any point of time. During the pendency of the said Special Civil Application, an affidavit of the petitioner for leading additional evidence as also affidavits of various other persons whom the respondent No.1 had regarded as the employees of the petitioner were filed before him. Certain documents and written documents were also filed before the respondent No.1. In view of this subsequent development, this Court [Coram: P.D. Desai, Actg.C.J. and M.B. Shah, J.], vide its order dated 2.5.1983, has directed the respondent No.1 to consider such evidence and submissions and to pass a supplementary order either cancelling or modifying or confirming the previous order.

7. Pursuant to the order passed by this Court on 2.5.1983, the respondent No.1 has passed supplementary order on 21.7.1983 Shri Ishwarbhai Gokulbhai Surti was examined and he was also cross-examined on behalf of the Provident Fund Department. Similarly, the other witnesses, whose affidavits have been filed, were also cross-examined by the Provident Fund Department. After appreciating and scrutinising these additional affidavits and records of the case, the respondent No.1 had come to the conclusion that the employees were given work for stitching the cloth and they were stitching such clothes as per the instructions and directions given by the owner of the establishment. It was further found by the repsondent No.1 that the work had been done on 'piece-rate basis'. It was also revealed from the statement of the witnesses that they were given bonus on Diwali days and during marriage season. The respondent No.1 has thus confirmed his previous order dated 15.9.1982 and directed the petitioner to produce all relevant records for the purpose of determination of dues.

8. Being aggrieved by the supplementary order passed by respondent No.1 on 21.7.1983 confirming his earlier order dated 15.9.1982, the petitioner concern had filed another writ petition being Special Civil Application No. 3817 of 1983 before this Court challenging both the

orders inter alia on the ground that the petitioner-concern was not 'establishment' within the meaning of Section 3(1)(b) of the Act and hence the Act is not applicable to the petitioner-concern. The order was also challenged on the ground that the job workers were not the employees of the petitioner and that the 21 alleged employees named in the first order dated 15.9.1982 were not employees of the petitioner-concern and that clubbing of the petitioner-concern with two other independent concerns, namely M/s. H. Lovely Stores and M/s. S. Lovely & Company was not proper. The constitutional validity of Section 7-A of the Act was also challenged in the said petition.

9. During the course of hearing of this 2nd petition, a suggestion was made by the learned advocate for the respondent authorities that the respondent authorities would entertain the representation to be made by the petitioner in regard to the subject matter of the petition and that such representation would be considered and the relief if any would be granted under the provisions of Section 19-A of the Act. In view of the said statement, the petitioner has withdrawn the petition at that stage reserving liberty to approach this Court again if necessary and if occasion arose.

10. The petitioner had filed detailed representation before the respondent No.2 on 30.8.1983. The said representation was decided by the respondent No.2 on 23.9.1983 dismissing the same under Section 19-A of the Act whereby he has confirmed the decision of the respondent No.1 by holding that the petitioner-concern has been covered under the Act and there was relationship of employer and employee between the petitioenr and the tailor and that clubbing of the two other concerns with the petitioner firm was correct in the eye of law. Being aggrieved by this order of the respondent No.2, the petitioner has approached this Court making the aforesaid challenges.

11. We have heard Mr. A.I. Surti, learned advocate appearing for the petitioner. No one appears on behalf of the respondent. However, the written arguments were filed by both the parties. Before we deal with the contentions raised by the petitioner and arguments made, oral as well as in writing, it is important to note that this Court has admitted the petition on 17.7.1984 and while admitting the petition, the respondents were given liberty to quantify the liability of the petitioner by passing appropriate order and the respondents were directed to place the said order before the Court and

thereafter the Court would decide as to what interim relief should be granted in favour of the petiitoner. No such order is placed on record till this date by the respondent authorities. It is however mentioned for the first time in the written arguments filed by the learned advocate for the respondents before this Court on 18.12.2001 that the repsondent No.1 passed further detailed order under Section 7-A of the Act on 30th January 1985 which according to the learned Advocate was sufficient to establish the claim of the department and on that count he has requested this Court to reject the petition filed by the petitioner.

12. As far as the Constitutional validity of Section 7-A of the Act is concerned, the learned advocate appearing for the petitioner has not argued much. However, he has relied on the pleadings made in the petition as well as arguments raised in the written arguments. According to the petitioner, Section 7A of the Act is violative of Articles 14 and 19(1)(f) and 19(1)(g) of the Constitution of India and hence it needs to be quashed and is ultra vires on the ground that the exclusion of judicial review of the order passed under Section 7A is unreasonable and that extraordinary remedy is not sufficient and that the hearing postulated by Section 7A would not be an effective hearing and that there is no appeal provision from an order under Section 7A of the Act. In support of this contention, the ld. advocate has relied on the decision of Delhi High Court in the case of M/s. Wire Netting Stores, Delhi and another Vs. The Regional Provident Funds Commissioner, New Delhi and others, - 1981 Lab.I.C. 1015, wherein the Court has held as under:

"(D) Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), Ss. 7-A and 19-A - Order of Commissioner under S. 7-A is final - It is not justiciable in Civil Court - S.7-A is violative of Art.14. (Constitution of India, Arts, 14 and 19). 1970 Lab. I.C. 1249 (Delhi) (Pt.B.) Reversed.

S.7-A is violative of Art. 14 of the Constitution. There is no appeal provided from an order under S. 7-A of the Act. The order passed by the Commissioner is made final and non-justiciable in a civil court. There is no compulsion under S. 19-A on the Central Government to determine a lis. In any case, even if it does, it will be a Tribunal of the first

instance, assuming that it will be exercising quasi-judicial power as is expected of a quasi-judicial Tribunal. In this view of the matter there is a serious lacuna in S. 7-A of the Act. The order may be passed by a duly competent and qualified person, but it is not subject to any review or revision judicially or quasi-judicially. The determination of the amount payable by the employer affects civil rights, if not fundamental rights. A provision should have been made for an appeal to a Tribunal, judicial or quasi-judicial. The availability of constitutional remedy cannot supply this lacuna. Section 7-A on this aspect has to be held to be unreasonable. (Para 18).

There is yet another approach one may take. If all the material on which the Commissioner relies in making a determination under S. 7-A of the Act, for example the Inspector's report, is not made available to a party which is likely to be adversely affected by the determination there is no effective hearing. Power is, no doubt, given to the Commissioner under sub-s. (2) of S. 7-A to enforce attendance of persons, examine them on oath, require the discovery and production of documents and to issue commissions for the examination of witnesses just as a civil court has and the proceedings before him are judicial proceedings within the meaning of S. 193 and S. 228 and S. 196, Penal Code. Nevertheless, there is no safeguard provided or provision made to enable an employer to have the same facilities of summoning witnesses, requiring discovery and production of documents or getting commissions issued. It could be said that a party can approach the Commissioner to do so but the question is of a right. In any case, the party concerned has no right to ask disclosure from the Commissioner or from a Commissioner's office. The hearing thus given could theoretically be an ineffective hearing, almost like an appeal from Caesar to Caesar. This would certainly make the provision unreasonable.

Post-decisional hearing is permitted in cases of grave urgency and not in other cases. Apart from the question of the applicability of the Act and the Scheme even the quantum may be determined under S. 7-A in proceedings like the

ones contemplated by the Act without disclosing the criteria. This would be in clear violation of the rules of natural justice. The least that is required when rights are likely to be affected is that there is legislative provision for some procedural safeguards. Article 14 of the Constitution ensures justness and fairness in State action. This is only possible if there is provision for judicial or quasi-judicial review or at least initially of a judicial or quasi-judicial determination after effective hearing.

Thus it is clear that in the absence of the provisions for appeal and a possible view that sub-s. (4) of S. 7-A bars the jurisdiction of the civil courts, S. 7-A must be held to be violative of Art. 14 of the Constitution, 1970 Lab. I.C. 1249 (Delhi) (Pt.B) Reversed."

13. However, in Inter-State Transport Agency Vs. Regional Provident Fund Commissioner - 1983 Lab.I.C. 940, a Division Bench of Patna High Court did not agree with the view taken by the Division Bench of the Delhi High Court in the abovereferred case and it has rejected the contention that Section 7A was ultra vires the Articles 14 of the Constitution or that it was unreasonable. Reliance was placed on the decision of the Patna High Court in K.L. Gupta Vs. Corporation, Greater Bombay, - AIR 1968 SC 303; Chinthalingam Vs. Government of India - (1970) 3 SCC 768; and Pannalal Bindraj Vs. Union of India - AIR 1957 SC 397. The Patna High Court also referred to the decision of the Supreme Court in Organo Chemical Industries Vs. Union of India, reported in (1979) 4 SCC 573, where similar arguments in respect of vires of Section 14-B of the Act were repealed and it was held that the absence of a provision for appeal or revision can be of no consequence. Following the decision in Organo Chemical Industries (Supra), a Division Bench of the Bombay High Court upheld the validity of Section 7A in the case of Prakash Kothari Vs. Regional Provident Fund Commissioner - (1990) 2 LLJ 217. The Division Bench of Punjab & Haryana High Court has also upheld the validity of Section 7A of the Act in the case of Sukh Chain & Company Vs. Food Corporation of India, reported in (1985) 2 LLN 207.

14. It is also important to take note of the fact that the validity of Section 7A is no longer open to any controversy for absence of a provision for appeal from orders passed thereunder. Sub-section (4), as

substituted by Act No. 33 of 1988, with effect from 1.8.1988 no longer contains any provision for finality of the orders passed under Section 7A. Moreover, Section 7-B and 7-I, inserted by the said amending Act with effect from the date to be notified by the Central Government, make provision for review of, and appeal from, orders passed under Section 7A. The Central Government has already constituted the Tribunal under the Act.

15. Considering the above judgment and looking to the insertion of the appeal provisions in the Act, though the period involved in the petition is prior to such insertion, we do not think it proper to hold that the provisions contained in Section 7A are ultra vires the Constitution. We reject this contention raised by the petitioner accordingly.

16. The petitioner has further challenged the constitutional validity of Section 19A of the Act as it is, according to the petitioner, ultra vires the Constitution on the ground that the exclusion of judicial review of order passed under Section 19A is unreasonable and that the extraordinary remedy is not sufficient safeguard and that the hearing postulated by Section 19A would not be an effective hearing. So far as this challenge to the Section 19A of the Act is concerned, the petitioner did not canvass any argument. It is necessary to refer to the decision of this Court in the case of Ram Narain & Company & Others Vs. Union of India & Another, reported in (1972) 13 G.L.R. 189, wherein similar issue arose before this Court and while upholding the constitutional validity of Section 19A of the Act, this Court has held as under;

> "It is the Central Government to whom it is left by the Legislature to determine how the Employees' Provident Funds Act shall be implemented from time to time in the various scheduled industries in the country. The power is delegated to the Central Government to extend the Act by amending the schedule of industries and by notifying from time to time the class of establishments under sec. 1(3) of the Act. Such a measure of social justice where the disputes have to be immediately resolved so that the statute does not remain a dead letter and the benefits of this benevolent measure reach the employees concerned as expeditiously as possible, the Legislature could well leave this function to

the Central Government to decide such point of doubt or difficulty so that the Act could be speedily implemented. The power is to be exercised as per the various restrictions like any other quasi-judicial power and within the four corners of the Act, and therefore, it could never be said that such a quasi-judicial power is arbitrary or unreasonable power without any guide-lines. The Act is, therefore, not ultra vires Articles 14 and 19(1)(g) of the Constitution. (Para 3).

By sec. 19A of the Employees' Provident Funds Act, there is no delegation of the legislative powers and the Legislature has not abdicated its function. It has only delegated ordinary quasi-judicial function to the Central Government instead of leaving it to ordinary Courts. Besides the directions are under sec. 19A required not to be inconsistent with the Act and, therefore, the vires of sec. 19A could not be challenged on the ground that it violates Articles 14 and 19(1)(g) of the Constitution."(Para 5)

In view of the above binding decision of this Court, we do not think it proper to take any different view, and reiterate that Section 19A of the Act is not ultra vires the Constitution of India. This contention of the petitioner is also accordingly rejected.

17. The petitioner, thereafter, raised an issue that the respondent No.1 has no authority or power to determine as to whether the petitioner's establishment is covered by the Act. It was submitted by the petitioner that the only power the respondent No.1 has, is to determine the amount due from the employer under the provisions of the Act, the scheme or the family pension scheme but no power is vested in him as to whether or not a factory/establishment of an employer is covered by the Act. It is therefore submitted by the petitioner that the inquiry conducted by the respondent No.1 is one without jurisdiction and ultra vires his power. The petitioner is not right in raising this contention as the issue is already concluded by the judgment of this Court in the case of The Textile & Allied Industries Research Organisation Vs. Regional Provident Fund Commissioner, reported in (1977) 18 GLR 540, wherein this Court has taken the view that it is implicit in the provision of Section 7A of the Act that the authority under the Act

has power to decide all the questions which ultimately enable it to determine the amount of compensation. Section 19A of the Act does not take away the jurisdiction of the authority under Section 7A to decide the question regarding the applicability of the Act.

18. The petitioner, thereafter, raised a contention that orders passed by the respondent No.1 on 15.9.1982 and 21.7.1983 of the Act clubbing these three units for the purpose of determining coverage of the unit by an order dated 23.9.1983 passed by the respondent No.2 under Section 19A of the Act approving the orders are illegal, erroneous and unwarranted in the facts and circumstances of the case. The petitioner further submitted that there was no unity of owners or management or control between these three establishments. It was further submitted by the petitioner that except for a common partner between M/s. S. Lovely & Company and M/s. H. Lovely Stores for a short period of about 3 & 1/2 months no person has been common partner at a given time. It was also submitted by the petitioner that merely because the petitioner's relative had control or management of the other units the three units cannot be clubbed. Lastly it was submitted on behalf of the petitioner that the other two concerns had started their business with their own capital brought along by their partners. For the purpose of showing that common ownership by itself is not enough, the petitioner has relied on the decision of the Supreme Court in the case of Regional Provident Fund Commissioner & Another Vs. Dharamsi Morarji Chemical Co.Ltd., reported in 1998 (1) LLJ 1060. The petitioner has further submitted that even if it is assumed that the clubbing is permissible so long as the trading activity is not dominant, the Act cannot apply as for dominant and primary activity of the establishment, the Central Government has not issued any notification under Section 1(3)(b) of the Act. According to the petitioner the petitioner-concern and M/s. S. Lovely & Company are engaged exclusively in tailoring activity and are not trading as covered establishment engaged in purchase, sale, or storage of any goods. For this purpose, the petitioner has relied on the figures of tailoring receipts and net profits of the petitioner-concern as well as M/s. S. Lovely & Company. The petitioner has also given the figures of gross sales and net profit of M/s. H. Lovely Stores. On the basis of these figures, it was contended by the petitioner that as compared to the total receipt of the tailoring activities, the gross sales of cloth, i.e. trading activity was negligible and in this view of the matter the petitioner has submitted that even after clubbing the three concerns, the

respondents have no authority or jurisdiction to apply the provisions of the Act or the scheme to the petitioner-concern as it would not be an establishment within the meaning of Section 1(3)(b) of the Act. In support of this proposition, the petitioner has relied on number of authorities which are enumerated as under:

1. Niton Industries Vs. Union of India & Others - 2000 (1) LLJ 1518;

2. Kadamba Sub-Urban Transport Corpo.Ltd. Vs. Assistant P.F. Commissioner - 2000 (1) LLJ 624;

3. B. Ganapathy Bhandarkar Vs. Regional Provident Fund Commissioner - 1990 (60) F.L.R. 143;

4. New Pai Sales Corporation & Anr. Vs. Regional Provident Fund Commissioner - 1996(73) FLR 1283;

5. M/s. Manav Mandir Hotel Vs. Regional Provident Fund Commissioner - 1991 (63) FLR 303;

6. Yashwant G. Chikhalkar and Others Vs. Killick Nixon Ltd. & Others - 1999 (11) LLJ 998;

7. Devesh Sandeep Associates & Others Vs. Regional Provident Fund Commissioner - 1997 (1) LLJ 1167;

8. Gujchem Distillers India Ltd. Vs. Regional Provident Fund Commissioner - 1985(2) GLR 653;

9. Metazinc Pvt.Ltd Vs. Regional Provident Fund Commissioner - 1991(63) FLR 30;

10. Ebrahim Currim & Sons Vs. Regional Provident Fund Commissioner - 1993 Lab.I.C. 1740;

11. Isha Steel Treatment, Bombay Vs. Association of Engineering Workers, Bombay & Others - 1987 (1) LLJ 427;

12. Harshadkumar M. Patel & Anr. Vs. K.C.D. Gangwami & Others - 1997 LLJ 895;

13. Subhashchandra Bose & Others Vs. E.S.I. Corporation - 1990 (60) FLR 539;

19. The cases cited above by the petitioner in his written arguments are decided by the Courts having regard to the facts of their own case and applying the law on the subject as held by the Apex Court. The moot questions which are however to be decided in this petition are as to whether the petitioner has been covered by the provisions of the Act, and in order to decide this point, it is to be ascertained as to whether the activities of the petitioner fall under the entry relating to a class of establishments engaged in trading and covered establishments and whether there is any relationship of eny employer-employee between the petitioner and the tailor and that whether the clubbing of 2 other concerns of the petitioner-firm was correct under the law, whether closing of any establishment has any effect on the coverage etc. To appreciate and evaluate the contentions of the petitioner, what the authorities have found is that M/s. Lovely Tailors was started as a proprietory concerned in the year 1958 by Ishwarbhai Gokulbhai Surti and the said concern was converted into a partnership concern by taking Vasantikaben as a partner. The same was done with a view to make expansion in trading for cloth and tailoring work as also for sale of readymade cloth. This business was being carried out by Ishwarbhai alone till that time. Again after dissolution of the said partnership firm, Ishwarbhai was the sole proprietor of the said concern. It was further found on record that M/s. S. Lovely & Company was started in 1975 at the same place as M/s. Lovely Traders and the partners were wife of Ishwarbhai, brother of Ishwarbhai and daughter of Ishwarbhai. This partnership too was constituted with a view to carry on trade in cloth, tailoring of cloth, stitching and sale of ready-made clothes. The recital of the deed shows that M/s. S. Lovely and Co., got its capital from M/s. Lovely Tailors. The ledger account also shows that M/s. S. Lovely & Co., has been financed by M/s. Lovely Traders. However, this finding was disputed by the petitioner. In 1974 another concern namely H. Lovely was started with three partners, one of whom was brother of Ishwarbhai, second was his wife and third was the son of Ishwarbhai. This concern was also started for the purpose of sale of cloth and to do the work of commission agent. M/s. Lovely Traders have also advanced an amount to M/s. H. Lovely. Keeping these facts in mind, if one applies the law laid down by the Apex Court in the case of Associated Cement Companies and their Workmen, reported in 1960 (1) LLJ Page 1, one would be justified in taking the view that there was ample justification for the authorities to club these three concerns for the purpose of determining coverage of the unit. The Apex

Court in this case has laid down the various decisions which would be applied to ascertain whether various firms constitute one integrally whole. These tests are unity of ownership, unity of management, supervision and control, unity of finance and employment, unity of labour and conditions of service, functional integrity, general unity of purpose and geographical proximity. It has been further observed in this case that in large number of cases several tests may fall for consideration at the same time, many enterprises may have functional integrality between factories which are separately owned, some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned. It has been further observed that no particular test can be adopted as an absolute test in all cases of this type and the word "establishment" is not to be given the sweeping definition of one organisation of which it is capable but rather it is to be considered in the ordinary business or commercial sense. In the petitioner's case, the authorities have found that there is unity of ownership, i.e., the family of Ishwarbhai and brother were the owners of all these 3 concerns. The management was by Ishwarbhai and the members of his family, supervision and control was also of the same family. Finance has also come from the same concern and therefore ample evidence of functional integrality, general unity of purchase and geographical proximity were found on record.

20. We further refer to the decision of the Apex Court in the case of J.G. Vakharia Vs. Regional Provident Fund Commissioner, Bombay - (1957) 1 LLJ 448. In this case, a silk mill was run by a partnership consisting of father and son. On the death of father the son entered into partnership with his two major sons. Shortly before the advent of the Act, the factory was made to close its business. Subsequently, the various machineries were leased to the members of the family owning separate units. Under the terms of the lease, they were bound to work in priority for the parent lessor company. On a question as to whether the various units run by the members of the family should be considered as distinct and independent units or as a subterfuge to avoid the liability of contribution under the Act, it was held by the Apex Court that the 5 units were not independent units and that they were clearly inter-dependent and in between them, they carried on same process which the original mill was carrying on and the process was carried on for the benefit of the original-mill and for no one else. It was found in this case that the entire transaction was subterfuge to avoid

the liability of contribution under the Act, and in fact the parent partnership continued to carry on the business through the separate units artificially set-up. In the present case also, the creation of different firms and conversion from proprietory concern to the partnership firm and closure of the concern etc., indicates nothing but the subterfuge to avoid the liability of contribution under the Act and it could not be permitted to succeed so as to defeat the rights of the employees who should be benefitted by the Act. We further refer to the decision of the Apex Court in the case of Rajasthan Premkrishan Goods Transport Company Vs. Regional Provident Fund Commissioner and Others (1996) 2 LLJ 262, wherein it is held by the Apex Court that the authorities functioning under the Act can pierce the veil and read between the lines within the outwardliness of the two apparent. In the present case, M/s. Lovely Tailors, M/s. S. Lovely & Company and M/s. H. Lovely are one and the same entity holding the ostensibly separate existence of these 3 particular concerns as artificial and non-existent even though they are projected as separate. Following this judgment, the authorities applied this doctrine of piercing veil for application of the provisions of the Act.

21. We therefore do not find any infirmity in the conclusion drawn by the authorities and making of clubbing of these three concerns for the purpose of determining coverage of the unit.

22. With regard to the relationship of employer and employee between the petitioner and the tailors who have been asked to do the work of stitching, under the direction of the petitioner, we refer to the decisions of the Apex Court in case of Dhrangadhra Chemical Works Ltd Vs. State of Saurashtra and Others - AIR 1957 SC 264; Birdhichand Sharma Vs. First Civil Judge, Nagpur - AIR 1961 S.C. 644; and Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishment and Anr., reported in AIR 1974 S.C. 37. In the case of Dhrangadhra Chemical Works (Supra), it has been held that prima facie test to be determined whether there was relationship between employer and employee is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the employee is to do but also the manner in which he had to do the work. In other words, the proper test is whether or not the master has the right to control the manner of execution of the work. It was also observed that the nature and extent of control may vary from business to business, and he is by

his nature incapable of precise definition, that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that even the test of control over the manner of work is not one of universal application and that there are many contracts in which the master could not control the manner in which the work was done.

23. In the case of Birdhichand Sharma (Supra), the question was whether the Bidi rollers were workmen within the meaning of the term "workman" in the Factories Act, 1948. The Court has held in this matter that the nature and extent of control varied in different industries and could not by its very nature be precisely defined. It was further observed by the Court that when the operation was of the simple nature and did not require supervision at that time, the control could be exercised at the end of the day by method of rejecting Bidis which did not come up to the proper standard and that such supervision by the employer was sufficient to make the workers employees of the employer and not independent contractors.

24. In Silver Jubilee Tailoring House case (Supra), the Apex Court has held that in any skilled employment to apply the test of control over the manner of work for deciding the question whether the relationship of master and servant exists would be unrealistic. The Court has further observed that in recent years the control test as traditionally formulated has not been treated as an exclusive test. It was found by the Court that control is obviously an important factor and in many cases it may still be the decisive factor but it is wrong to say that in any other case it is decisive. It is now no more than a factor although an important one. It is further observed in the above case that quite apart from all the circumstances, as the employer has the right to reject the contract if it does not conform to the instructions of the employer and direct the worker to restitch it, the element of control and supervision as formulated in the decision of the Court is also present. In the petitioner's case, there is ample evidence that the petitioner has a right to reject the stitched clothes if they do not conform fully to the directions of the petitioner. The Court has further observed that the reputation depends not only on the cutter, but also upon the tailors. In many cases, stitching is a delecate operation as the cloth of which it is carried on belongs to the customer. The defect in the stitching might mar the appearance not only of the garment but also of the wearer. It is for the proprietor to see that it is

perfect. He has to keep his customers pleased and he has to be punctual, which means that the stitching must be done according to the instructions of the employer and within the time specified. The degree of control and supervision would be different in different types of business. If an ultimate authority resided in the employer so that he was subject to the later's direction that would be sufficient. The Court has further observed that a person can be servant of more than one employer, the servant need not be under the exclusive control of one employer. He can be employed under more than one employer. This is one of the contentions raised by the petitioner in the present case and his contention, therefore, has to be rejected in the light of the principles laid down by the Apex Court in the above Judgment. The Court has further observed that the fact that the workers are not obliged to work for the whole day in the shop is not very material. There is ofcourse, no reason that a person who is employed part-time should not be a servant and it is doubtful whether regular part-time servant can be considered to suggest any thing other than a contract of service. This Court had also an occasion to deal with this point in the case of M/s. Satish Plastics Vs. Regional Provident Fund Commissioner, reported in (1981) 22 GLR 686, wherein it was held that in private employment there is no legal bar to work for some one else nor doing the work elsewhere than at the master's place. Concept of flexible hours is also well-known concept since many years. Thus a master-servant relationship exists and parties cannot make it a different relationship by applying the label of contract. An employee called by any other name remains an employee for the juridical relationship does not depend on the nomenclature devised in order to defeat the law. Any law will not countenance a slap in its face by its non-respectors who choose to flout it by disingenuous and circuitous devices.

25. Having regard to the facts found by the authorities and having further regard to the law laid down by the Apex Court on this aspect, we have no hesitation in rejecting the contentions raised by the petitioner with regard to absence of employer-employee relationships between the petitioner and the tailors. It also covers the issues raised by the petitioner to the effect that 20 persons are not employed in trading activity and none of the units engaged more than 19 persons.

26. This leads us to the last point raised by the petitioner regarding its coverage under Section 1 read with Schedule I to the Act. For appreciating this

contention, it is necessary to refer to the principles of law laid down by the Apex Court in the case of Associated Industries Vs. Regional Provident Fund Commissioner (1963) 2 LLJ 652. The Apex Court has laid down the various propositions of law which say that if a factory carries on one industry which falls under Schedule 1 to the Act and satisfies the requirement as to the number of employees, it falls under Section 1(3)(a) of the Act. If the factory carries on more than one industry all of which fall under Schedule 1 and its numerical strength satisfies the prescribed test, it is an establishment under Section 1(3)(a) of the Act. If a factory runs more industries than one, one of which is the primary and the dominant industry of the others are its feeders, and can be regarded as subsidiary, minor or incidental industries, in that sense then the character of dominant and primary industry will determine the question whether a factory is an establishment under Section 1(3)(a) of the Act or not. If the dominant and primary industry falls under Schedule 1, the fact that the subsidiary industries did not fall under Schedule 1, will not help to exclude the application of Section 1(3)(a) of the Act. If the dominant and primary industry does not fall under Section 1 but one or more subsidiaries, incidental, minor and feeding industries fall under Schedule 1, Section 1(3)(a) will not apply. If the factory runs more industries than one, all of which is independent of each other and constitute separate and distinct industries, Section 1(3)(a) will apply to the factory even if one or more but not all of the industries run by the factory fall under Schedule 1. When 2 industries carried on in a factory are independent of each other, then no question arises as to which is the principal and which is subsidiary. As soon as it is shown that the factory is carrying on two industries independent of each other, one of which falls under Schedule 1, it becomes a composite factory to which Section 1(3)(a) of the Act applies. In the petitioner's case, the facts on record and materials found show that the petitioner and 2 other concerns were engaged in trading and commercial activities and therefore in view of the aforesaid principles laid down by the Apex Court, they were covered under the entry relating to the class of establishments engaged in trading and commercial under Schedule 1, and we are therefore of the view that the provsions of Section read with Schedule 1 would apply to the facts of the petitioner's case and the petitioner is covered under the Act.

27. Having regard to the facts and evidence on record and findings arrived at by the authorities below as well as looking to the totality of the circumstances and

having applied the law laid down by the Apex Court as well as this Court to the facts of the petitioner's case, we are of the view that the petitioner is not entitled to any relief sought for in this petition and hence the petition fails. Rule is therefore discharged. However, looking to the facts and circumstances of the case, there will be no order as to costs.

[D.M. Dharmadhikari, C.J.]

rmr. [K.A. Puj, J.]